

No. 84-111

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**In the Supreme Court of the United States**

OCTOBER TERM, 1984

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HAROLD DEAN BUTTS, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIFTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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## **MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends that the court of appeals erred in reversing an order suppressing evidence obtained from the monitoring of an electronic tracking device ("beeper") installed in an airplane.

On September 1, 1981, petitioner was charged in an indictment returned in the United States District Court for the Northern District in Texas with importing marijuana into the United States, in violation of 21 U.S.C. 960(a)(1) and 952(a); possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and carrying a firearm during the commission of a felony, in violation of 18 U.S.C. 924(c)(2). On April 13, 1982, the district court suppressed all evidence obtained as the result of the monitoring of a beeper installed in an aircraft which petitioner piloted on August 22 and 23, 1981. It ruled that although a search

warrant was obtained to install the beeper, it was unlawful for customs officials to fail to obey a directive in the warrant to remove it no later than August 19, 1981 (Pet. App. C1-C10). A panel of the court of appeals affirmed (Pet. App. B1-B35; 710 F.2d 1139). The full court granted the government's petition for rehearing en banc and, by a 10-5 vote, reversed the order suppressing evidence (Pet. App. A1-A38; 729 F.2d 1514).

Petitioner contends (Pet. 8-19) that the failure of customs officials to comply with the directive of the warrant requiring the removal of the beeper by a particular date violated the Fourth Amendment. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court.<sup>1</sup> The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction affirmed on appeal, he will then be able to present his present contention to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.<sup>2</sup>

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<sup>1</sup>It is now almost three years since the return of the indictment and more than 28 months since the district court's suppression order. Further interlocutory review at this time would cause additional delay in trial of the charges against petitioner.

<sup>2</sup>Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE  
*Solicitor General*

AUGUST 1984